



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E226 OF 2021

KENNEDY WAMBUA SUKALI.....PLAINTIFF

-VERSUS-

THE NAIROBI HOSPITAL.....1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND DEFENDANT

RULING

1. The plaintiff has taken out the ex parte Notice of Motion dated 15th September, 2021 supported by the grounds laid out on its body and the facts stated in the affidavit of the plaintiff. The plaintiff sought for the substantive order for leave to file his suit out of time and a further order that the suit be deemed as having been duly filed with leave.
2. At the hearing of the Motion, the plaintiff's advocate chose to rely on the grounds and averments made in the supporting affidavit.
3. I have considered the grounds set out on the face of the ex parte Motion.
4. It is clear that the order sought in this instance is for leave to institute the suit out of time.
5. The plaintiff states in his affidavit that he was at all material times employed by the 1st defendant before his employment was terminated on 3rd May, 2014.
6. The plaintiff further states that subsequently, the 1st defendant lodged a complaint against him with the 2nd defendant, in relation to allegations of loss of money through employee fraud.
7. It is stated by the plaintiff that as a result of the complaint made by the 1st defendant, he was subsequently charged in court by agents of the 2nd defendant on 25th July, 2014 together with other persons not before this court, with the offence of stealing by servant contrary to Section 281 of the Penal Code.
8. It is also stated by the plaintiff that following conclusion of the prosecution case, the criminal court found that the prosecution had not established a prima facie case and consequently acquitted him together with his co-accused, vide the ruling delivered on 27th February, 2020.
9. The plaintiff states in his affidavit that since then, he faced financial constraints which impeded his ability to file the suit within the statutory timelines.
10. Upon considering the averments set out hereinabove, I observed that the 2nd defendant is a Government entity. Consequently, the provisions of the Public Authorities Limitations Act would apply.
11. **Section 3** of the **Public Authorities Limitation Act Cap 39** provides as follows:

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—

(a) twelve months, in the case of proceedings founded on tort or;

(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.”

12. From the foregoing, it is clear that actions founded on tort against the Government must be brought within 12 months of the cause of action accruing.

13. Turning to **Section 4(2)** of the **Limitation of Actions Act, Cap 22 Laws of Kenya**, the provision is clear that claims based on tort are to be brought within a period of three (3) years from the date on which the cause of action arose. In the present instance, I established that the claim is that of malicious prosecution and hence the time would begin to run on the date the plaintiff was acquitted, being 27th February, 2020.

14. Further on, **Section 27(1)** of the Act stipulates as follows:

“Section 4(2) does not afford a defence to an action founded on tort where—

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.”

15. From the foregoing, it is clearly brought out that the instances in which a court can extend the time required to file a suit are in cases involving negligence, nuisance or breach of duty. Malicious prosecution claims such as the present one are not catered for under the above provision.

16. The position remains that this court’s jurisdiction does not and cannot extend to malicious prosecution claims. In so finding, I am both supported and bound by the Court of Appeal decision in the case of **Mary Ofundwa v Nzoia Sugar Company Limited Kisumu CA No. 244 of 2009** thus:

“This section clearly lays down the circumstances in which the court, would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the Plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”

17. The above position was restated in the recent case of **Omari Ismael Mazzha v Office of the Director of Public Prosecution (ODPP) & another [2021] eKLR** with the court reasoning that:

“In the case at hand, the Applicant is seeking damages in respect of the tort of malicious prosecution which is not covered by Section 27 of the Limitation of Actions Act. In that regard I am persuaded by the holding in the case of Peter Gichuki Mwangi Vs. Kenya Copyright Board & 3 others [2018] eKLR where it stated: -

“In the instant application, the Applicant’s claim would be seeking damages for malicious prosecution for which Section 27 and 28 of the Limitation of Actions Act (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under Section 27 of the Limitation of Action Act and no other. This court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law do not allow or where the requirements which are specifically set out have not been satisfied.”

18. In the premises, I hereby dismiss the Motion dated 15th September, 2021 for lack of merit. There will be no order on costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant